No. 772

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

THE NEW YORK TRUST COMPANY, as the Trustee under the Debenture Agreements between It and THE UNITED LIGHT AND POWER COMPANY, and others,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION and THE UNITED LIGHT AND POWER COMPANY.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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We are constrained to make the following comments in connection with the briefs submitted on behalf of the respondents:

1. We fully agree with the statement on page 7 of the Commission's brief to the effect that the questions presented "are recurring and therefore in one sense are important in the administration of the Act"; although, of course, we would not qualify the statement with the phrase "in one sense"—whatever that may mean.

2. **Both respondents evade the all-important question of Section 26(c) which controls the entire Act.** Through wishful thinking, the Commission, by a vague footnote at page 11 of its brief, which begs the question, and Power, by its complete silence, seek to eliminate any consideration of the immensely important question posed by the plainly-spoken will of Congress in Section 26(c) of the Public Utility Holding Company Act of 1935 which, in unmistakable terms, prohibits the very thing which the Commission's order of February 25, 1942 attempts to do to valid antecedent contract rights of the debentureholders.

26(c) provides as follows:

> Nothing in this title shall be construed (1) to affect the validity of any loan or extension of credit (or any extension or renewal thereof) made or of any lien created prior or subsequent to the enactment of this title, unless at the time of the making of such loan or extension of credit (or extension or renewal thereof) or the creating of such lien, the person making such loan or extension of credit (or extension or renewal thereof) or acquiring such lien shall have actual knowledge of facts by reason of which the making of such loan or extension of credit (or extension or renewal thereof) or the acquisition of such lien is a violation of the provisions of this title or any rule or regulation thereunder, or (2) to afford a defense to the collection of any debt or obligation or the enforcement of any lien by any person who shall have acquired such debt, obligation, or lien in good faith for value and without actual knowledge of the violation of any provision of this title or any rule or regulation thereunder affecting the legality of such debt, obligation, or lien.

Paraphrase cannot add to the clarity of that provision. It declares not only that (1) *nothing* in the Act can be construed to diminish the solemn obligation of the debentures but *also* that (2) *nothing* in the Act can be employed to afford a defense to the collection of the debt or obligation

of the debentures. The provision is discussed under Point IV (pp. 14-16) of our main brief.

In the very face of this Congressional edict the Commission and Power persist in arguing that the operation of the statute does in fact afford a defense to valid antecedent contract rights of the debentureholders.

It is understandable that the Commission, through excessive zeal, and that Power, through obvious self-interest, can blind themselves to the written limits of delegated power. But it is truly amazing that the Court below upon a judicial review of such delegated power has completely ignored and has failed to discuss this controlling provision of the statute.

The 6100 holders of Power's debentures and the thousands upon thousands of funded debt creditors of other public utility holding companies similarly situated cannot but be dismayed and bewildered by a ruling which, if allowed to stand, constitutes on its face a defiance of the express will of Congress. *If Section 26(c) does not mean what it says, then what does it mean?*

Our views on the applicability of Section 26(c) have the support of the Seventh Circuit Court of Appeals in *City National Bank & Trust Co.* v. *Securities and Exchange Commission*, decided March 5, 1943 (subsequent to the filing of our main brief), wherein the Court said:

> "In the beginning, we think it may be assumed that an order of the Commission which impaired or destroyed a property right fixed by contract would violate Sec. 26(c) of the Act."

To our knowledge no other court has commented on Sec. 26(c).

The Commission's brief (p. 12) gives full recognition to the existence of the contract rights of the debentureholders to receive interest until 1973-75, subject only to the right of the obligor to redeem the debentures earlier at an agreed premium. The existence of those rights was recognized also in the opinion of the Court below (R. 323).

Those are the antecedent contract rights to which we refer above. That makes it unanimous. All parties here, and the Court below, agree upon the validity of these contract rights.

Confusion will pile on confusion until this Court defines the significance of Sec. 26(c).

3. In Power's brief (pp. 5, 13) it is stated that the arguments of the petitioners are in large part an attack on the validity of the dissolution order. That is wholly incorrect. The attack is not upon the validity of the dissolution order of March 20, 1941 but upon the Commission's unjustified attempt to enlarge the scope of that order. The dissolution order was designed to simplify Power's system by separating Power from the system, which objective was attainable without impairing contract rights of the debentureholders. The attack is not directed to that point in the proceedings but to the subsequent point at which the Commission attempted by its order for the retirement of the debentures to enlarge the scope of the dissolution order with the result of destroying antecedent contract rights of the debentureholders. That is the point at which the debentureholders were "aggrieved". What the petitioners are now seeking is the modification of the order for the retirement of the debentures (not the dissolution order) as prayed in the petition filed in the Court below (R., p. X).

What a hollow mockery would be the statutory provision for judicial review, if as the respondents suggest, the debentureholders were precluded from a review of the order by which they were first aggrieved, just because they did not apply for a review of the dissolution order which did not affect their contract rights!

4. On pages 9 and 10 of Power's brief there are statements as to certain special circumstances regarding the debentures and the "financial losses" of the stockholders. The statements are not relevant to this application for certiorari, which is not concerned with any special circumstances which happen to be present in this case but is

concerned with the importance which the legal questions involved have in the administration of the Act. When certiorari is granted, we shall point out in our brief upon review that the above-mentioned statements as to special circumstances are incomplete, and we shall mention additional circumstances which show what the situation is.

We submit that, notwithstanding the opposition of the respondents, certiorari should be granted.

Respectfully submitted,

BEN LEROY STOWELL
IRWIN L. TAPPEN

March 24, 1943.